

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 16, 2024, or as soon thereafter as the matter may be heard, in Courtroom 7 of the above-entitled Court, on the 19th Floor of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, Defendants Salesforce, Inc., Board of Directors of Salesforce, Inc., Marc Benioff, The 401(k) Plan Committee, Joseph Allanson, Stan Dunlap, and Joachim Wettermark (“Defendants”) will and hereby do move for an order granting Defendants summary judgment and dismissing all claims asserted by Plaintiffs Gregor Miguel and Amanda Bredlow (“Plaintiffs”), pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities in support of the Motion, the declaration of Eric Serron, the pleadings and papers on file in this action, and on all other matters that may be judicially noticed or presented at the hearing of this matter.

DATED: November 13, 2023

Respectfully submitted,

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By: /s/ Eric G. Serron

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Salesforce, Inc. (“Salesforce”) and various alleged fiduciaries of the Salesforce 401(k) Plan (“Plan”)¹ respectfully submit this Memorandum of Points and Authorities in support of their Motion for Summary Judgment.

I. STATEMENT OF ISSUES TO BE DECIDED

1. Whether summary judgment should be granted dismissing Plaintiffs' claim against the Committee for breach of the fiduciary duty of prudence under ERISA § 404(a), 29 U.S.C. § 1104(a) pursuant to Federal Rule of Civil Procedure 56 because (a) there is no genuine dispute that the Committee members satisfied their duty of prudence, and (b) Plaintiffs cannot show that any alleged imprudence caused a loss to the Plan.

2. Whether summary judgment should be granted dismissing Plaintiffs' claim against Salesforce and the Board for failure to adequately monitor the Committee pursuant to Federal Rule of Civil Procedure 56 because the underlying breach of fiduciary duty claim against the Committee fails as a matter of law.

II. INTRODUCTION

The plaintiffs in this ERISA fiduciary breach class action—current and former participants (“Plaintiffs”) in the Salesforce 401(k) Plan (“Plan”)—claim that the Defendants violated their prudence duty between March 11, 2014 and July 19, 2019 (the “Class Period”) by failing to replace certain investment options on the Plan’s menu with allegedly cheaper alternatives. Specifically, Plaintiffs claim that Defendants acted imprudently by failing to: (1) select lower-fee share classes of the JPMorgan SmartRetirement® mutual fund series of target date funds (“JPMorgan TDFs”); (2) replace the JPMorgan TDFs with the JPMCB SmartRetirement® Passive Blend CF series of collective investment trust target date funds (“Passive Blend CITs”); and (3) replace two Fidelity mutual funds—the Contrafund K class (“Contrafund K”) and the Diversified International Fund K class (“International K”)—with two allegedly similar Fidelity collective investment trusts, the Contrafund Commingled Pool (“Contrafund CIT”) and the Diversified International Commingled

¹ In addition to Salesforce, these alleged fiduciaries include the Company’s Board of Directors (“Board”), the Plan’s 401(k) Plan Committee (the “Committee”), a member of the Board, and members of the Committee (collectively, “Defendants”).

1 Pool (“International CIT”), respectively.² Plaintiffs also assert that certain Defendants are liable
 2 derivatively for failing to monitor the Plan’s fiduciaries and prevent these alleged breaches.

3 It is well-settled that ERISA requires “prudence, not prescience.” *See, e.g., Pension Ben.*
 4 *Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712
 5 F.3d 705, 716 (2d Cir. 2013) (citation omitted). A fiduciary is required to “discharge his
 6 responsibility ‘with the care, skill, prudence, and diligence’ that a prudent person ‘acting in a like
 7 capacity and familiar with such matters’ would use.” *Tibble v. Edison Int’l*, 575 U.S. 523, 528
 8 (2015) (quoting 29 U.S.C. § 1104(a)(1)(B)). Although that duty includes an obligation to “monitor
 9 trust investments and remove imprudent ones,” *id.* at 529; *Hughes v. Nw. Univ.*, 595 U.S. 170, 176
 10 (2022) (same), ERISA “does not give the federal courts broad license to second-guess the
 11 investment decisions of retirement plans.” *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1162 (6th
 12 Cir. 2022). Rather, satisfaction of that duty “turns on ‘the circumstances . . . prevailing’ at the time
 13 the fiduciary acts,” and courts “must give due regard to the range of reasonable judgments a
 14 fiduciary may make based on her experience and expertise.” *Hughes*, 595 U.S. at 177.

15 The undisputed evidence makes clear that Plaintiffs’ prudence claims are meritless and that
 16 Defendants are entitled to summary judgment. As to the claim that Defendants failed to include the
 17 lowest-fee share class of the JPMorgan TDFs, there is simply no genuine dispute that (i) the Plan in
 18 fact offered the R5, formerly named “Institutional,” class from the outset of the Class Period, and
 19 never offered the higher-fee “I,” formerly named “Select,” class on which Plaintiffs’ claim is based;
 20 and (ii) the R5 class was actually cheaper on a “net cost” basis than the R6 class due to the Plan’s
 21 receipt of .15% (15 basis points) in revenue sharing from the R5 class that was used to pay Plan
 22 expenses. Further, Defendants’ decision to forego replacing the JPMorgan TDFs, the Contrafund K
 23 and the International K (collectively, the “Challenged Funds”) with Plaintiffs’ preferred CIT
 24 alternatives prior to July 19, 2019, was well within the “range of reasonable judgments” that
 25 Defendants were entitled to make based on their investment consultant’s advice regarding the lack of
 26 transparency and the short track records of Plaintiffs’ preferred CITs, which made them questionable
 27 options under the Plan’s own investment policy. *Hughes*, 595 U.S. at 177. Moreover, Plaintiffs

28 ² See Dkt. 38 (First Amended Complaint ¶¶ 11-13, 75-78, 113).

1 cannot demonstrate, as they must, that the Plan suffered a loss from any of the alleged fiduciary
 2 breaches. *See Call v. Sumitomo Bank of Cal.*, 881 F.2d 626, 632-33 (9th Cir. 1989).

3 **III. STATEMENT OF UNDISPUTED FACTS**

4 **A. The Plan**

5 Salesforce sponsors the Salesforce 401(k) Plan (the “Plan”), a participant-directed defined
 6 contribution retirement plan.³ In such plans, a participant chooses, based on his or her personal
 7 investment preferences, from a range of investment options available on the plan’s investment
 8 menu.⁴ From year-end 2014 to year-end 2021, the Plan’s participants increased from approximately
 9 10,000 to 50,000, and Plan assets increased from \$665 million to over \$6 billion.⁵

10 **B. The Committee Followed a Prudent Process for Selecting and Monitoring 11 Investment Options.**

12 The 401(k) Plan Committee (“Committee”) was the Plan’s named fiduciary and was
 13 responsible for the “day-to-day oversight and administration” of the Plan, including selecting and
 14 monitoring the Plan’s core investment options.⁶

15 In 2013, the Committee adopted an Investment Policy Statement (“IPS”) setting forth
 16 guidelines for the Plan’s investment program, which was updated in 2016.⁷ Under the IPS, the
 17 Committee was to, among other things, offer participants a diversified range of funds, identify
 18 appropriate investment options to make available, and select qualified investment funds.⁸

19 Regarding the selection of funds for inclusion on the Plan’s menu, the 2013 IPS provides that
 20 unless specifically exempted by the Committee, “[e]ach investment option chosen should have at
 21 least \$100 million in assets under management, be well-diversified and have a minimum of 5 years

22 ³ Ex. 1, “Salesforce 401(k) Plan Form 5500,” 2021, Notes to Financial Statements, p. 10; Ex. 13,
 23 Statement of Investment Policy, Objectives and Guidelines for Salesforce 401(k) Plan, updated Sept.
 24 9, 2016 (“2016 IPS”), SALESFORCE_0000993, at 1000. Citations in the form “Ex. __” refer to the
 exhibits to the accompanying Declaration of Eric G. Serron.

25 ⁴ See “Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans,” 75
 26 Fed. Reg. 64910 (Oct. 20, 2010).

27 ⁵ Exs. 1, 3-9, Salesforce.com, Inc. Retirement Savings Plans Form 5500 Filings, 2014–2021; Ex. 10,
 28 Expert Report of Steven C. Case (“Case Rep.”), Ex. 1.

29 ⁶ Ex. 11, “401(k) Plan Committee Charter (Minutes of a Meeting of the 401k Committee of
 30 Salesforce.com, Inc., Exhibit A),” June 18, 2015, SALESFORCE_0051293-299, at 297.

31 ⁷ Ex. 12, 2013 IPS, Feb. 12, 2013, SALESFORCE_0060743; Ex. 13, 2016 IPS.

32 ⁸ Ex. 12, 2013 IPS at 746; Ex. 13, 2016 IPS at 996.

1 of verifiable investment performance.”⁹ The 2016 IPS increased the assets under management
 2 criterion to a \$1 billion minimum, while retaining the requirement that the option have at least 5
 3 years of verifiable investment performance.¹⁰ The 2013 and 2016 IPSs further provide that “the
 4 Committee will, on a periodic basis, review the actual results achieved by the Plans’ investment
 5 options . . . to verify that each fund is being managed in compliance with the investment guidelines
 6 and the performance objectives stated herein,” and will use relevant “performance benchmarks, both
 7 market indices and peer universes.”¹¹ The 2013 and 2016 IPSs provide that the Committee will
 8 evaluate an option’s performance against its relevant benchmarks “over trailing quarter- and year-to-
 9 date, one- three-, five- and ten-year periods.”¹² The IPSs further suggest that the Committee prepare
 10 a Watch List on a quarterly basis and place funds on the Watch List for potential removal if they
 11 meet certain underperformance criteria, such as if a fund underperforms its benchmark for three
 12 consecutive quarters.¹³

13 In 2018, the Committee also developed an Investment Beliefs Statement that articulates the
 14 core beliefs of the Committee members regarding the nature of financial markets and how their
 15 decision-making could add value to participants, with assistance from an investment consultant,
 16 Willis Towers Watson. The Committee adopted the Investment Beliefs Statement after
 17 consideration of multiple drafts.¹⁴

18 The Committee met at least quarterly, and more frequently in most years during the Class
 19 Period.¹⁵ It included members with expertise relevant to the selection of investments,¹⁶ who also
 20 relied on the advice of expert consultants. The Plan’s investment consultant, Bridgebay Financial
 21 Inc. (“Bridgebay”), attended Committee meetings and prepared quarterly reports that evaluated,
 22 among other things, the performance, risk, and fees of the Plan’s investment options, and addressed

23
 9 Ex. 12, 2013 IPS at 750.

24 10 Ex. 13, 2016 IPS at 999.

25 11 Ex. 12, 2013 IPS at 750; Ex. 13, 2016 IPS at 1001.

26 12 Ex. 12, 2013 IPS at 751; Ex. 13, 2016 IPS at 1001.

27 13 Ex. 12, 2013 IPS at 751-52; Ex. 13, 2016 IPS at 1002.

14 Ex. 14, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Feb. 2, 2018,
 SALESFORCE_0060889-890 at 889; Ex. 15, “Minutes of a Meeting of the 401k Committee of
 Salesforce.com, Inc.,” Feb. 20, 2018, SALESFORCE_0060872-873 at 872.

15 Ex. 16, Wettermark Tr. at 34:23-35:3, 35:12-25; Ex. 10, Case Rep., Ex. 4.

16 Ex. 10, Case Rep. at 30-32.

1 other topics, including: regulatory developments, a plan overview, and a market review.¹⁷ The
 2 reports also included a section that compared the expense ratios of the Plan’s investment options to
 3 those of their peers.¹⁸ Each Committee member received and was expected to review the quarterly
 4 reports prior to the meetings.¹⁹ Committee members received annual ERISA fiduciary training from
 5 an outside ERISA attorney, who attended meetings and provided updates on important ERISA
 6 fiduciary developments.²⁰ The Plan’s recordkeeper, Fidelity Retirement Services (“Fidelity”), also
 7 made regular presentations to the Committee on ERISA fiduciary developments.²¹

8 **C. The Plan Transitioned Away from Paying Recordkeeping Fees Through
 9 Revenue Sharing.**

10 The governing Plan document does not obligate Salesforce to pay the expenses of
 11 administering the Plan. Instead, as permitted by ERISA § 403(c)(1), the Plan’s governing document
 12 allows all reasonable Plan administration expenses to be charged to the Plan and its participants.²²
 13 Plaintiffs do not allege that the Plan’s recordkeeping fees or other administration expenses during the
 14 Class Period were excessive or unreasonable.

15 At the beginning of the Class Period, the Plan used revenue sharing—a common arrangement
 16 under which payments received from a plan’s investment options are used to compensate a plan
 17 service provider—to pay recordkeeping fees owed to the Plan’s recordkeeper, Fidelity, along with
 18 other administrative expenses.²³ Fidelity’s fees at that time were capped at 14 basis points (0.14%)
 19 of the Plan’s total assets.²⁴ In 2015, Fidelity presented two revised recordkeeping fee proposals to
 20 the Committee: an asset-based fee arrangement reduced to 10 basis points (equivalent to \$57 per
 21

22 ¹⁷ See, e.g., Ex. 17, “3Q 2016 Review of the Salesforce.com inc. 401(k) Savings Plan,” Sept. 30,
 23 2016, SALESFORCE 0004561-658.

24 ¹⁸ See, e.g., *id.* at 591-94.

25 ¹⁹ Ex. 16, Wettermark Tr. at 38:20-23; Ex. 18, Allanson Tr. at 39:2-13, 44:21-24.

26 ²⁰ See Ex. 10, Case Rep. at 33-34.

27 ²¹ See *id.*

28 ²² Dkt 24-9, Serron MTD Decl., Ex. 8, (Plan) §§ 19.05, 20.14.

23 ²³ Ex. 19, “Fidelity Investments Retirement Plan Service Agreement,” July 13, 2015,
 24 SALESFORCE_0002672-698 at 673; Ex. 20, “Fidelity Transparency Report,” Mar. 31, 2014,
 25 SALESFORCE_0002465; Ex. 12, 2013 IPS, at 744; Ex. 13, 2016 IPS, at 994; see Ex. 10, Case Rep.
 26 at 36-37.

27 ²⁴ Ex. 19, “Fidelity Investments Retirement Plan Service Agreement,” July 13, 2015,
 28 SALESFORCE_0002672-698 at 673.

1 participant), and a fixed-dollar per-participant annual fee of \$49 per participant collected through
 2 revenue sharing.²⁵ After considering the revised proposals and discussing them with Bridgebay, the
 3 Committee voted to adopt the latter option, effective October 1, 2015.²⁶

4 In July 2017, Fidelity agreed to reduce the Plan’s recordkeeping fees from \$49 to \$37 per
 5 participant (\$12 in savings per participant), effective October 1, 2017, which Bridgebay calculated
 6 would result in a 24.5% reduction in recordkeeping expenses.²⁷ That recordkeeping fee reduction
 7 facilitated the Plan’s transition away from revenue-sharing, and instead toward charging participant
 8 accounts directly for Plan administration expenses. In mid-2017, Bridgebay noted that “Salesforce
 9 is seeking to reduce or eliminate revenue sharing from the plan by selecting fund share classes with
 10 zero or very little revenue share” in order to increase transparency to Plan participants.²⁸ Bridgebay
 11 analyzed the potential impact on the Plan of converting many investment options to “lower-fee,
 12 zero-revenue share versions of the same funds.”²⁹ Recognizing that “to remove revenue share from
 13 all of the funds is not completely possible as some funds are only available with revenue share
 14 payments,” Bridgebay recommended that the Committee rebate the revenue share generated by
 15 remaining funds that still paid revenue sharing back to the Plan participants.³⁰ With the proposed
 16 transition of the JPMorgan TDFs and eight other funds to zero-revenue share classes, Bridgebay
 17 concluded that the asset-weighted average expense ratio of the Plan’s investment options would fall
 18 from 53 basis points to 43 basis points, with the Plan’s revenue share as a percentage of total Plan
 19 assets being reduced from 13 basis points to 2 basis points as of June 30, 2017.³¹ Bridgebay
 20 recommended that the change to zero-revenue share classes be implemented wherever possible, and
 21 that Fidelity’s \$37 per participant recordkeeping fee and other Plan administration expenses be

22²⁵ Ex. 21, “Recordkeeping Re-Pricing of the Salesforce.com and Foundation 401(k) Plan,” June 30,
 23 2015, SALESFORCE_0029309-319 at 311.

24²⁶ Ex. 22, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Oct. 2, 2015,
 25 SALESFORCE_0048048-051 at 049; Ex. 23, “Fidelity Investments Retirement Plan Service
 26 Agreement,” May 19, 2016, SALESFORCE_0002699-726 at 700.

27²⁷ Ex. 24, “2Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan,” June 30, 2017,
 28 SALESFORCE_0013864, at 13867, 13876; Ex. 25, “Minutes of a Meeting of the 401k Committee
 29 of Salesforce.com, Inc.,” July 12, 2017, SALESFORCE_0060868.

30²⁸ Ex. 24, “2Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan,” June 30, 2017,
 31 SALESFORCE_0013864, at 13880.

31²⁹ *Id.* at 13868.

32³⁰ *Id.* at 13878, 13880.

33³¹ *Id.* at 13878, 13879.

1 charged directly to participants' accounts.³² At its September 13, 2017 meeting the Committee
 2 approved the recommendation.³³

3 **D. The Committee Prudently Retained the JPMorgan TDFs.**

4 During the second quarter of 2013, following a request for proposals ("RFP"), the Committee
 5 selected the JPMorgan TDFs as the Plan's replacement for the Fidelity Freedom Funds.³⁴ Bridgebay
 6 assisted with the RFP and recommended the JPMorgan TDFs because, at that time, JPMorgan was
 7 "honored as asset allocator of the year by Morningstar and most of the funds were four- and five-
 8 star-rated funds by Morningstar."³⁵ The Committee carefully monitored the JPMorgan TDFs
 9 throughout the Class Period. At the Committee's December 9, 2014 meeting, representatives of
 10 JPMorgan gave a presentation to the Committee regarding the JPMorgan TDFs' philosophy,
 11 investment strategy, management, organization, and JPMorgan's participant education practices.³⁶
 12 In addition, every quarterly report that Bridgebay provided to the Committee during the Class Period
 13 contained an entire section devoted to the JPMorgan TDFs, which included each TDF's Morningstar
 14 rating, portfolio composition, returns compared to benchmark and peer group median over 1-year, 3-
 15 year, 5-year and 10-year periods, calendar year returns for the last ten years, as well as each
 16 vintage's risk metrics.³⁷

17 Bridgebay also conducted exhaustive annual due diligence reviews of the JPMorgan TDFs,
 18 which included (1) ERISA regulatory guidance on target date funds ("TDFs"), (2) a TDF market
 19 background, (3) information regarding the JPMorgan TDFs' investment approach, asset allocation,
 20 glide path, underlying strategies and management team, (4) information regarding JPMorgan
 21 participant communications, (5) peer TDF comparisons (with respect to investment strategies, asset

22 ³² *Id.* at 0013868, 13878, 13879.

23 ³³ Ex. 26, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," Sept. 13, 2017,
 24 SALESFORCE_0079169-171 at 170; *see also* Ex. 27, "4Q 2017 Review of the Salesforce.com Inc.
 25 401(k) Savings Plan," Dec. 31, 2017, SALESFORCE_0016377-471 at 380-81.

26 ³⁴ Ex. 28, Bridgebay Financial, "Salesforce.com Inc. 401(k) Savings Plan," Mar. 31, 2014,
 27 SALESFORCE_0003495-606 at 497; Ex. 29, Ruiz-Zaiko Tr. at 42:14-43:7; Ex. 10, Case Rep. ¶ 102.

28 ³⁵ Ex. 29, Ruiz-Zaiko Tr. at 43:14-44:4.

29 ³⁶ Ex. 30, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," Dec. 9, 2014,
 30 SALESFORCE_0048778-780 at 780.

31 ³⁷ *See, e.g.*, Ex. 28, Bridgebay Financial, "Salesforce.com Inc. 401(k) Savings Plan," Mar. 31, 2014,
 32 SALESFORCE_0003495-606 at 563-586; Ex. 31, Bridgebay Financial, "4Q 2018 Review of the
 33 Salesforce.com Inc. 401 (k) Savings Plan," Apr. 19, 2019, SALESFORCE_0003130-224, 197-208.

1 classes, and fees), (6) glide path comparisons, and (7) peer TDF performance comparisons.³⁸ At the
 2 Committee's June 9, 2017 meeting, three representatives from JPMorgan provided an overview of
 3 the JPMorgan TDFs in connection with Bridgebay's annual due diligence review for that year.³⁹
 4 Bridgebay then presented its analysis of the funds' fees and investment allocation positioning
 5 compared to the other TDF providers and outlined the pros and cons of JPMorgan's conservative
 6 approach. The Committee members proceeded to review the performance of the underlying funds of
 7 the JPMorgan TDFs, the total assets and participants invested in the JPMorgan TDFs, and the TDFs
 8 offered by other providers.⁴⁰

9 The Institutional class of the JPMorgan TDFs was renamed the R5 class as of April 3, 2017.
 10 Each vintage of the Institutional/R5 class retained the same ticker symbol before and after the name
 11 change.⁴¹ The Plan included the Institutional/R5 class of the JPMorgan TDFs on its menu at all
 12 times between the start of the Class Period and December 29, 2017, when the Plan switched to the
 13 R6 class.⁴² The JPMorgan TDFs were also available in a Select class, which was renamed the I class
 14 as of April 3, 2017.⁴³ The Plan never offered the Select/I class of the JPMorgan TDFs.⁴⁴

15 JPMorgan announced the creation of the R6 class for its TDFs in November 2014, stating
 16 that "[t]he availability of the R6 share class offers advisers and plan sponsors ... a non revenue share

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³⁸ Ex. 32, "Target Date Fund Review," Dec. 31, 2015, SALESFORCE 0038442-508; Ex. 33,
 18 "Target Date Fund Review," Mar. 31, 2017, SALESFORCE 0042867-971; Ex. 34, "Target Date
 19 Fund Evaluation," Apr. 17, 2018, SALESFORCE 0011833-884.

³⁹ Ex. 33, "Target Date Fund Review," Mar. 31, 2017, SALESFORCE 0042867-971; Ex. 35,
 20 "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," June 9, 2017,
 SALESFORCE 0060869-871 at 869-870.

⁴⁰ Ex. 35, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," June 9, 2017,
 SALESFORCE 0060869-871 at 870.

⁴¹ Ex. 84, "JPMorgan SmartRetirement Funds, Supplement to the Summary Prospectus," Nov. 1,
 2016; Ex. 86, "JPMorgan SmartRetirement 2040 Fund, Summary Prospectus November 1, 2016, as
 supplemented April 10, 2017," Apr. 10, 2017; Ex. 85, "JPMorgan SmartRetirement 2040 Fund,
 Summary Prospectus," Nov. 1, 2017; Ex. 83, "JPMorgan SmartRetirement® 2030 R5 JSMIX,"
 Morningstar, Oct 3, 2022; *see* Ex. 36, Conner Tr. at 174:21-176:14, 184:19-186:7.

⁴² *See* Ex. 6, 2017 Form 5500 at 4, 7, 8-11 (showing that the R5 Class of the JPMorgan TDFs paid
 indirect compensation to the Plan's recordkeeper, Fidelity, in 2017); Ex. 88, Fidelity Investment
 Retirement Plan Service Agreement, Feb. 11, 2014, SALESFORCE 0002553-585 at 564; Ex. 89,
 "Fidelity Transparency Report," Q3 2017; Ex. 91, Summary Plan Description, 2015,
 SALESFORCE 0014428-459 at 457-459; Ex. 10, Case Rep. ¶ 76; Ex. 37, Heavner Rep. ¶ 27; Ex.
 38, Miguel Tr. at 39:20-24, 43:1-44:4; Ex. 39, Bredlow Tr. at 47:6-50:9.

⁴³ Ex. 90, "JPMorgan, Supplement to the Prospectuses and Statements of Additional Information,"
 Sept. 8, 2016; Ex. 36, Conner Tr. at 179:10-180:8.

⁴⁴ Ex. 36, Conner Tr. at 179:10-180:15; Ex. 10, Case Rep. ¶ 76; Ex. 37, Heavner Rep. ¶ 28.

1 class.”⁴⁵ The R6 class had a nominally lower expense ratio (*i.e.*, fee) than the Institutional/R5 class,
 2 in an amount that varied by date and fund vintage.⁴⁶ However, the Institutional/R5 class also paid 15
 3 basis points in revenue sharing to cover Plan recordkeeping fees and other administrative expenses,
 4 which would otherwise be charged directly to participants—unlike the R6 class, which paid no
 5 revenue sharing.⁴⁷ Because the revenue sharing paid by the Institutional/R5 class exceeded the fee
 6 differential between the Institutional/R5 class and the R6 class, the Institutional/R5 class was
 7 actually cheaper on a net cost basis than the R6 class.⁴⁸

8 The revenue sharing that the Plan received from the Institutional/R5 class of the JPMorgan
 9 TDFs was used to compensate Fidelity for recordkeeping services provided to the Plan.⁴⁹ Any
 10 revenue sharing that exceeded the amount necessary to compensate Fidelity for its recordkeeping
 11 services was deposited in a Revenue Credit Account, which could be used only for payment of other
 12 Plan administration expenses or rebated to participants.⁵⁰ There is no evidence that any amounts
 13 held in the Revenue Credit Account were used for any other purpose.⁵¹ Nor have Plaintiffs alleged
 14 or come forward with any evidence that the Plan’s administrative expenses were unreasonable.⁵²

15 Around the second quarter of 2017, in connection with the reduction of Fidelity’s
 16 recordkeeping fees to \$37 per participant, Bridgebay suggested that the Committee switch from the
 17 R5 class of the JPMorgan TDFs to the R6 class.⁵³ Along with the other fund share class changes that
 18 accompanied Fidelity’s recordkeeping fee reduction, Bridgebay concluded that the conversion to the
 19 R6 class would contribute to an overall reduction in the asset weighted-average expense ratio of the
 20 Plan’s investment options.⁵⁴ At its September 13, 2017 meeting the Committee approved the

21 ⁴⁵ Dkt. 24-15 (JPMorgan Press Release).

22 ⁴⁶ Ex. 37, Heavner Rep. ¶ 29.

23 ⁴⁷ Ex. 36, Conner Tr. at 189:6-15.

24 ⁴⁸ *Id.* at 187:11-188:23.

25 ⁴⁹ Ex. 19, “Fidelity Investments Retirement Plan Service Agreement,” July 13, 2015,
 26 SALESFORCE_0002672-698 at 673; Ex. 20, “Fidelity Transparency Report,” Mar. 31, 2014,
 27 SALESFORCE_0002465; Ex. 88, Fidelity Investment Retirement Plan Service Agreement, Feb. 11,
 28 2014, SALESFORCE_0002553-585 at 580-582; Ex. 10, Case Rep. ¶ 69.

⁵⁰ Ex. 10, Case Rep. ¶ 69; Ex. 21, “Recordkeeping Re-Pricing of the Salesforce.com and Foundation
 401(k) Plan,” June 30, 2015, SALESFORCE_0029309-319 at 309; *see supra* note 49.

⁵¹ Ex. 36, Conner Tr. at 87:22-88:8; 108:22-109:1.

⁵² *Id.* at 61:6-19.

⁵³ Ex. 24, “2Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan,” June 30, 2017,
 25 SALESFORCE_0013864, at 13878, 13879.

⁵⁴ *Id.*

1 recommended share class change,⁵⁵ which became effective on December 29, 2017.⁵⁶ Bridgebay
 2 subsequently informed the Committee that, effective November 1, 2017, the expense ratios of the
 3 JPMorgan SmartRetirement Fund R6 class had been further reduced by between 2 basis points and 8
 4 basis points, depending on the fund vintage.⁵⁷

5 In January 2018, at the Committee's request, Bridgebay sent a comprehensive RFP to six
 6 alternative TDF providers, including Capital Group, American Century, BlackRock, Fidelity, T.
 7 Rowe Price, and Vanguard.⁵⁸ Bridgebay presented a report to the Committee comparing the six
 8 TDF candidates' underlying asset classes, underlying investment funds, performance, and fees.⁵⁹
 9 Upon selection of three finalists (Capital Group (American Funds), BlackRock, and JPMorgan),
 10 Bridgebay, again at the Committee's request, performed additional analysis of the three finalists'
 11 TDF products and provided a "lengthy and detailed written report," including information about the
 12 three TDFs' glide paths, underlying asset classes, their respective 1-year, 3-year, 5-year, and 10-
 13 year performance, risk metrics, and fees.⁶⁰ On August 21, 2018, representatives from Capital Group
 14 (American Funds), BlackRock, and JPMorgan attended a Committee meeting, during which the
 15 Committee and Bridgebay interviewed the three finalists.⁶¹ The Committee members and Bridgebay
 16 representatives then discussed the interviews, and the Committee requested that Bridgebay prepare a
 17 scorecard to assist in deciding which of the three finalists to select.⁶² At the November 16, 2018
 18 Committee meeting, Bridgebay presented the requested scorecard and advised that any of the
 19 candidates would be a prudent choice for the Plan, before ultimately recommending JPMorgan.⁶³

20

⁵⁵ Ex. 26, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," Sept. 13, 2017,
 21 SALESFORCE_0079169-171 at 170.

⁵⁶ Ex. 37, Heavner Rep. ¶ 27; Participant Notice, Nov. 2017, Dkt. 24-10.

⁵⁷ Ex. 27, "4Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan," Dec. 31, 2017,
 23 SALESFORCE_0016377-471 at 380.

⁵⁸ Ex. 40, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," May 17, 2018,
 24 SALESFORCE_0067803-804 at 803; Ex. 29, Ruiz-Zaiko Tr. at 62:2-15.

⁵⁹ Ex. 34, "Target Date Fund Evaluation," Apr. 17, 2018, SALESFORCE_0011833-884.

⁶⁰ Ex. 42, "Summary of Target Date Fund Finalists," Aug. 21, 2018, SALESFORCE_0011821-832;
 25 Ex. 40, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," May 17, 2018,
 26 SALESFORCE_0067803-804 at 803; Ex. 43, SALESFORCE_0060891, at 60892.

⁶¹ Ex. 43, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," Aug. 21, 2018,
 27 SALESFORCE_0060891-894 at 891-892.

⁶² *Id.*

⁶³ Ex. 44, "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," Nov. 16, 2018,
 28 SALESFORCE_0006050-052 at 050.

1 The scorecard showed that Bridgebay gave JPMorgan the highest qualitative score (based on nine
 2 factors), the second highest quantitative score (based on five factors including fees), and the highest
 3 weighted total core (weighting the qualitative and quantitative scores equally).⁶⁴ The Committee
 4 ultimately accepted Bridgebay's recommendation and approved retaining JPMorgan.⁶⁵

5 **E. The Committee Prudently Selected and Monitored the Fidelity Funds.**

6 At the beginning of the Class Period, the Plan offered the Contrafund K and the Diversified
 7 International Fund K on its investment menu.⁶⁶ In May 2017, Fidelity introduced lower fee versions
 8 of these funds—the Contrafund K6 and the Diversified International K6—that did not pay revenue
 9 sharing.⁶⁷ Although the expense ratio of the K6 funds was lower, the K funds paid 20 basis points in
 10 revenue sharing, resulting in a net-of-revenue-sharing expense ratio difference between the K and
 11 the K6 funds that was smaller or even negative.⁶⁸

12 Around the second quarter of 2017, concurrently with its recommendation that the
 13 Committee convert the JPMorgan TDFs to the R6 class, Bridgebay conducted an analysis of the
 14 potential impact on the Plan of “switching 8 [other] funds, including the Fidelity Contrafund [and]
 15 the Fidelity Diversified International Fund . . . to zero-revenue share classes.”⁶⁹ Bridgebay
 16 recommended the conversions, concluding that the move to the zero-revenue share funds would
 17 contribute to reducing the asset-weighted average expense ratio of the Plan’s investment options.⁷⁰
 18 As noted previously, Bridgebay also recommended that the Plan’s recordkeeping fee and other
 19 administrative expenses be charged directly to participants’ accounts.⁷¹ At its September 13, 2017
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 21
 22

23 ⁶⁴ Ex. 45, Bridgebay, “Score Card Summary - Target Date Providers,” Sep. 5, 2018,
 24 SALESFORCE_0008097.

25 ⁶⁵ Ex. 44, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Nov. 16, 2018,
 26 SALESFORCE_0006050-052 at 050-051.

27 ⁶⁶ Ex. 20, “Fidelity Transparency Report,” Mar. 31, 2014, SALESFORCE_0002465.

28 ⁶⁷ Ex. 76, Fidelity Contrafund K6, Quarterly Fund Review, Sept. 30, 2023; Ex. 77, Fidelity
 29 Diversified International K6 Fund, Quarterly Fund Review, Sept. 30, 2023.

⁶⁸ Ex. 10, Case Rep., p. 46.

⁶⁹ Ex. 24, “2Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan,” June 30, 2017,
 27 SALESFORCE_0013864.

⁷⁰ *Id.* at 13878, 13879.

⁷¹ *Id.* at 0013868, 13878, 13879.

1 meeting, the Committee approved the conversion of the Contrafund K and the International K to the
 2 K6 versions as part of the overall change to the Plan’s recordkeeping fee arrangement.⁷²

3 By the fourth quarter of 2017, Bridgebay recommended that the Committee place the
 4 International K6 Fund on the Plan’s Watch List because its returns were lagging behind its peer
 5 group.⁷³ In early 2019, on Bridgebay’s recommendation, the Committee removed the fund from the
 6 Watch List due to its improved performance.⁷⁴

7 **F. The Committee Appropriately Considered Collective Investment Trusts.**

8 The Committee regularly considered offering CITs during the Class Period. When
 9 Bridgebay proposed amendments to the Plan’s IPS in early 2016, Bridgebay provided the Committee
 10 with a document describing CITs, which was discussed at the Committee’s March 18, 2016 meeting.
 11 Bridgebay highlighted that CITs have high minimum requirements—“generally \$50 million in assets
 12 per investment strategy”—and the challenge presented by the fact that many CITs had only three- to
 13 five-year performance track records.⁷⁵ Bridgebay further noted that “according to SEC regulations,
 14 the CIT portfolios can only publish the performance of the assets managed in the CIT,” and could
 15 not publish the track record of their mutual fund counterparts.⁷⁶ Both the 2013 and 2016 versions of
 16 the Plan’s IPS stated that “[e]ach investment option chosen should have [...] a minimum of 5 years
 17 of verifiable investment performance.”⁷⁷ The 2016 IPS allowed the Committee to use the track
 18 record of a “registered mutual fund with the same investment management team and [that] follows
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 20

21 ⁷² Ex. 26, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Sept. 13, 2017,
 22 SALESFORCE_0079169-171 at 170.

23 ⁷³ Ex. 27, “4Q 2017 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Dec. 31, 2017,
 24 SALESFORCE_0016377-471 at 382.

25 ⁷⁴ Ex. 47, “1Q 2019 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Mar. 31, 2019,
 26 SALESFORCE_0003885-974 at 888-889; Ex. 48, “Minutes of a Meeting of the 401k Committee of
 27 Salesforce.com, Inc.,” Apr. 19, 2019, SALESFORCE_0060861-864 at 862-863.

28 ⁷⁵ Ex. 49, “4Q 2015 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Dec. 31, 2015,
 29 SALESFORCE_0004739-839 at 753-754; *see also* Ex. 50, Email from Nickolas Zaiko to Stacy Fox
 30 and Linda Ruiz-Zaiko, Subject: RE: Salesforce 401(k) Plan IPS, Mar. 2, 2016,
 31 SALESFORCE_0037400-405; Ex. 51, “Minutes of a Meeting of the 401k Committee of
 32 Salesforce.com, Inc.,” Mar. 18, 2016, SALESFORCE_0060886-887 at 887.

⁷⁶ Ex. 49, “4Q 2015 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Dec. 31, 2015,
 77 SALESFORCE_0004739-839 at 754.

⁷⁷ Ex. 12, 2013 IPS at 750; Ex. 13, 2016 IPS at 999.

1 the same investment strategy” as a CIT in the evaluation process, but recommended “specialized
 2 review and analysis of the investment manager and strategy.”⁷⁸

3 Fidelity offered a CIT that was similar to the Contrafund K—the Contrafund CIT. However,
 4 the Contrafund K and the Contrafund CIT are entirely different investment vehicles with entirely
 5 separate underlying investment portfolios.⁷⁹ Although the Contrafund CIT had a lower expense ratio
 6 than the Contrafund K, the Contrafund K paid 20 bps in revenue sharing, whereas the CIT paid no
 7 revenue sharing.⁸⁰ Thus, the Contrafund K had an effective expense ratio of 41 basis points (net of
 8 recordkeeping offset), which was lower than the Contrafund CIT’s expense ratio of 43 basis points.⁸¹

9 At the same March 2016 meeting at which Bridgebay discussed CITs with the Committee,
 10 Fidelity provided a comparison of the Contrafund K to the Contrafund CIT. Fidelity highlighted
 11 similar issues to those noted by Bridgebay, including the relative lack of a performance history for
 12 the Contrafund CIT and the lack of a Morningstar rating.⁸² Fidelity’s comparison also highlighted
 13 that the Contrafund K was cheaper than the Contrafund CIT after accounting for revenue sharing.⁸³

14 Bridgebay informed the Committee at its December 16, 2016 meeting that the Plan’s assets
 15 in the Contrafund K had exceeded the minimum fund asset level of \$50 million to qualify for the
 16 Contrafund CIT.⁸⁴ However, Bridgebay highlighted that the Contrafund CIT’s “inception date is
 17 1/17/2014,” that “[t]he investment policy currently requires that an investment option have a
 18 minimum of 5 years’ track record to be considered,” and that “[t]he CIT currently does not have a
 19 Morningstar Rating.”⁸⁵

20 Similarly, Fidelity also offered a CIT that was similar to the International K Fund—
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22
 23 ⁷⁸ Ex. 13, 2016 IPS at 1000.
 24 ⁷⁹ See Ex. 37, Heavner Rep. ¶ 42.
 25 ⁸⁰ Ex. 52, Fidelity Presentation, Mar. 18, 2016, SALESFORCE_0074558-592 at 579.
 26 ⁸¹ Ex. 17, “3Q 2016 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Sept. 30, 2016,
 27 SALESFORCE_0004561-658 at 563.
 28 ⁸² Ex. 52, Fidelity Presentation, Mar. 18, 2016, SALESFORCE_0074558-592 at 579.
 29 ⁸³ *Id.*
 30 ⁸⁴ Ex. 17, “3Q 2016 Review of the Salesforce.com inc. 401(k) Savings Plan,” Sept. 30, 2016,
 31 SALESFORCE_0004561-658 at 563; *see* Ex. 53, “Minutes of a Meeting of the 401k Committee of
 32 Salesforce.com, Inc.,” Dec. 16, 2016, SALESFORCE_0079189-191 at 191.
 33 ⁸⁵ Ex. 17, “3Q 2016 Review of the Salesforce.com inc. 401(k) Savings Plan,” Sept. 30, 2016,
 34 SALESFORCE_0004561-658 at 563.

1 the International CIT. But like the Contrafund, the International K Fund and International CIT are
 2 entirely different investment vehicles with entirely separate underlying investment portfolios.⁸⁶
 3 Likewise, although the International CIT had a lower expense ratio, the International K Fund paid 20
 4 basis points in revenue sharing, whereas the CIT paid no revenue sharing.⁸⁷ Further, the inception
 5 date of the International CIT was December 13, 2013;⁸⁸ and the International K Fund had a
 6 Morningstar rating,⁸⁹ while the International CIT did not.

7 As for the JPMorgan TDFs, Bridgebay's annual due diligence review, presented at the
 8 Committee's June 17, 2016 meeting, noted that the Plan "now qualifies for the CIT version" of the
 9 JPMorgan TDFs—the JPMCB SmartRetirement CF-10 class.⁹⁰ Bridgebay indicated, however, that
 10 the JPMCB SmartRetirement CF-10 class then had only \$1.2 billion in assets under management,
 11 along with an inception date of September 30, 2015, which meant that it had a track record of less
 12 than a year. Ms. Ruiz-Zaiko of Bridgebay further testified that the Committee was particularly
 13 concerned with the lack of publicly available information about CITs in situations where the CIT
 14 had a relatively short track record.⁹¹

15 A different JPMorgan CIT series, the Passive Blend CITs, had an earlier inception date of
 16 December 31, 2010,⁹² but the Passive Blend CITs are a different TDF strategy than the JPMorgan
 17 TDFs that the Plan had on its investment menu. A fact sheet shows that the 2025 Passive Blend
 18 CIT, for example, has only 18 holdings, and that four of the fund's top ten holdings are passively
 19 managed index funds.⁹³ Furthermore, at the time the Committee selected the JPMorgan TDFs to

21
 86 See Dkt. 82-4 (Declaration of D. Lee Heavner) ¶¶ 9-10.

87 Ex. 89, "Fidelity Transparency Report," Q3 2017; Ex. 92, "Fidelity Transparency Report," Q3
 2019.

88 Ex. 59, "2Q 2020 Review of the Salesforce.com Inc. 401(k) Savings Plan," Sept. 15, 2020,
 SALESFORCE_0049290-387 at 353.

89 See id.; Ex. 17, "3Q 2016 Review of the Salesforce.com inc. 401(k) Savings Plan," Sept. 30, 2016,
 SALESFORCE_0004561-658 at 620-621.

90 Ex. 32, "Target Date Fund Review," Dec. 31, 2015, SALESFORCE_0038442-508; Ex. 44,
 "Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.," June 17, 2016,
 SALESFORCE_0060884-885 at 885.

91 Ex. 29, Ruiz-Zaiko Tr. at 71:24-73:10; 77:8-78:19.

92 See Dkt. 38 (First Am. Compl.) ¶ 112.

93 Dkt. 40-8, Fact Sheet, JPMCB SmartRetirement® Passive Blend 2025 Fund CF-B, Sept. 30,
 2020), at 3.

1 replace the Fidelity Freedom Funds in the second quarter of 2013,⁹⁴ the Passive Blend CITs had only
 2 two years of performance history. The Committee did not expand the search to include passive
 3 blend funds until late 2018 or early 2019. In November 2018, Bridgebay recommended that the
 4 Committee consider switching from the JPMorgan TDFs to the Passive Blend CIT series, which
 5 Bridgebay found to have “similar investment profiles and strategies but … had lower fees.”⁹⁵

6 At an April 19, 2019 Committee meeting, following the completion of the target date fund
 7 RFP, the Committee renewed its discussion about switching the Plan’s TDF series and three core
 8 funds from mutual fund versions to CIT versions.⁹⁶ A Fidelity representative presented materials
 9 regarding the company’s CITs and Bridgebay representatives assisted Fidelity in answering the
 10 Committee’s CIT questions, including concerns about “regulators, transparency, and adherence to
 11 the same investment philosophy as the mutual fund counterparts.”⁹⁷ Bridgebay also circulated a
 12 detailed analysis comparing the R6 class of the JPMorgan TDFs to the Passive Blend CITs.⁹⁸ After
 13 further discussions, the Committee approved the recommended changes from the JPMorgan TDFs to
 14 the Passive Blend CITs; from the Contrafund K6 to the Contrafund CIT; and from the International
 15 K6 to the International CIT, effective July 20, 2019.⁹⁹ As of April 2019, the track records of the
 16 Contrafund CIT and the International CIT had exceeded five years by just a few months.¹⁰⁰

17 **IV. STANDARD OF REVIEW**

18 Under Rule 56 of the Federal Rules of Civil Procedure, a “party may move for summary
 19 judgment, identifying each claim or defense—or the part of each claim or defense—on which
 20 summary judgment is sought.” Fed. R. Civ. P. 56(a). “Summary judgment must be granted if the
 21 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

22 ⁹⁴ See Ex. 28, Bridgebay Financial, “Salesforce.com Inc. 401(k) Savings Plan,” Mar. 31, 2014,
 23 SALESFORCE_0003495-606 at 497; Ex. 10, Case Rep. ¶ 102.

24 ⁹⁵ Ex. 44, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Nov. 16, 2018,
 25 SALESFORCE_0006050-052 at 050-051.

26 ⁹⁶ Ex. 48, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Apr. 19, 2019,
 27 SALESFORCE_0060861-864 at 863; Ex. 18, Allanson Tr. at 72:19-73:15.

28 ⁹⁷ Ex. 48, “Minutes of a Meeting of the 401k Committee of Salesforce.com, Inc.,” Apr. 19, 2019,
 29 SALESFORCE_0060861-864 at 862.

30 ⁹⁸ *Id.* at 863.

31 ⁹⁹ *Id.* at 862-863; Ex. 58, “2Q 2019 Review of the Salesforce.com Inc. 401(k) Savings Plan,” June
 32 30, 2019, SALESFORCE_0004243-349 at 246.

33 ¹⁰⁰ Ex. 59, “2Q 2020 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Sept. 15, 2020,
 34 SALESFORCE_0049290-387 at 349, 353.

1 judgment as a matter of law.” *Id.*

2 A principal purpose of summary judgment “is to isolate and dispose of factually unsupported
 3 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The party moving for summary
 4 judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Id.*
 5 at 323. Where, as in this case, the nonmoving party bears the ultimate burden of proof at trial, the
 6 moving party can meet its initial burden on summary judgment by “showing . . . that there is an
 7 absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325 (cleaned up).
 8 Once this initial burden of production has been met, the burden then shifts to the nonmoving party to
 9 “produce evidence to support its claim or defense.” *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz*
 10 *Cos., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000); *see also C.A.R. Transp. Brokerage Co., Inc. v.*
 11 *Darden Restaurants, Inc.*, 213 F.3d 474, at 480 (9th Cir. 2000) . “If the nonmoving party fails to
 12 produce enough evidence to create a genuine issue of material fact, the moving party wins the
 13 motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103 (citing *Celotex*, 477 U.S. at 322).

14 A fact is material if it could affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*,
 15 477 U.S. 242, 248-49 (1986). In deciding whether a material fact is genuinely disputed, the court
 16 must view the evidence in the light most favorable to the non-moving party, drawing all justifiable
 17 inferences in that party’s favor. *Id.* at 255. However, it is not the Court’s task “to scour the record
 18 in search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)
 19 (cleaned up). The Court is entitled to rely on the nonmoving party to “identify with reasonable
 20 particularity the evidence that precludes summary judgment.” *Id.*

21 **V. ARGUMENT**

22 **A. Plaintiffs’ Claims of Imprudence Lack Merit**

23 The undisputed facts show that Defendants are entitled to summary judgment on Plaintiffs’
 24 claims of imprudence. ERISA’s prudence standard focuses on the fiduciary’s process in making a
 25 decision; it examines how the fiduciary “arriv[ed] at an investment decision,” not on results. *In re*
 26 *Unisys Savs., Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996).¹⁰¹ As *Hughes* makes clear, satisfaction of

27 ¹⁰¹ See also, e.g., *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1221, 1229-30 (N.D. Cal. 2008)
 28 (key to prudence is “the thoroughness of the fiduciary’s decision making process”); *PBGC ex rel. St. Vincent Catholic Med. Ctrs., v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 716 (2d Cir. 2013)

1 ERISA’s duty of prudence “turns on ‘the circumstances . . . prevailing’ at the time the fiduciary
 2 acts,” and courts “must give due regard to the range of reasonable judgments a fiduciary may make
 3 based on her experience and expertise.” 595 U.S. at 177. The record in this case establishes that:
 4 (1) Defendants followed a prudent process for monitoring the Plan’s investment options; (2) the Plan
 5 included the R5 (formerly “Institutional”) class of the JPMorgan TDFs on its menu, and not the I
 6 (formerly “Select”) class; and (3) Defendants’ decisions to retain the R5 class of the JPMorgan
 7 TDFs until December 29, 2017, and to forego replacing the JPMorgan TDFs and the mutual versions
 8 of the Fidelity Contrafund and Diversified International Fund with Plaintiffs’ preferred CITs until
 9 July 19, 2019, were all within the “range of reasonable judgments” Defendants could make under the
 10 circumstances prevailing at the time. *Hughes v. Nw. Univ.*, 63 F.4th 615, 630 (7th Cir. 2023) (“a
 11 plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness”). Furthermore,
 12 Plaintiffs have failed to established that the Plan suffered a loss as a result of any of the alleged
 13 fiduciary breaches. *See Call*, 881 F.2d at 632-33.

14 **1. Defendants Followed a Prudent Monitoring Process**

15 The record shows that the Defendants had a robust process for monitoring the Plan’s
 16 investment options. The Committee met regularly, kept minutes of its meetings, and employed the
 17 services of an independent, fiduciary investment consultant (Bridgebay) as well as outside legal
 18 counsel (Mr. Aguirre), both of whom regularly attended Committee meetings. With Bridgebay’s
 19 assistance, the Committee adopted an IPS in 2013, which it updated in 2016. The IPS described the
 20 Plan’s investment objectives and the roles and responsibilities of Committee members, Plan service
 21 providers, and consultants; and provided broad guidelines regarding how the Committee should
 22 execute its duties (e.g., selecting and monitoring investment options). With assistance from another
 23 third-party consultant, the Committee also developed an Investment Beliefs Statement, which the
 24 Committee adopted in 2018 after review and discussion of multiple drafts.

25 Bridgebay’s assistance in monitoring the cost and performance of the Plan’s investment
 26 options provides strong evidence that the Committee followed a prudent process in making its

27 (fiduciaries are judged “upon information available . . . at the time,” not “hindsight” (quotation
 28 omitted)).

1 decisions. Bridgebay provided the Committee with quarterly investment evaluation reports and
 2 other periodic targeted analyses, reported on the performance and fees of the Plan's investment
 3 options, and attended the Committee's quarterly meetings to answer questions and provide further
 4 explanation if there were any issues. Each Committee member was expected to review Bridgebay's
 5 quarterly reports prior to scheduled meetings. Bridgebay also conducted separate, in-depth annual
 6 "due diligence" reviews of the JPMorgan TDFs' performance, glide path construction, underlying
 7 investments, investment management, and fees, which were also presented at Committee meetings.
 8 When the Committee considered whether to add, remove or replace investment options, it sought
 9 and reviewed detailed analyses from Bridgebay, questioned Bridgebay regarding the data provided,
 10 and considered and discussed such information at length before reaching a decision.

11 Plaintiffs have yet to identify *any* deficiency in the Committee's monitoring process.
 12 Instead, Plaintiffs have attempted to infer a deficient process from factually unsupported claims that
 13 Defendants failed to (i) select the lowest-cost share class of the JPMorgan TDFs; and (ii) timely
 14 replace the JPMorgan TDFs and the mutual fund versions of the Fidelity Contrafund and Diversified
 15 International Fund with allegedly lower-cost CITs that purportedly had substantially identical
 16 underlying assets. For the reasons described in further detail below, the undisputed factual record
 17 refutes Plaintiffs' claims. This Court should therefore grant Defendants' motion for summary
 18 judgment on Plaintiffs' duty of prudence claim.

19 **2. There Is No Genuine Dispute that Defendants Selected the Lowest-Cost
 20 Share Class of the JPMorgan TDFs**

21 There is no genuine dispute that the Plan included the Institutional/R5 class of the JPMorgan
 22 TDFs on its investment menu prior to December 29, 2017. The Plan's business records—including
 23 the Plan's recordkeeping agreements with Fidelity, Fidelity's fee disclosures to the Plan, the Plan's
 24 2015 summary plan description, Bridgebay's reports, and the named Plaintiffs' individual account
 25 statements—demonstrate that the Plan in fact included the Institutional/R5 class of the JPMorgan
 26 TDFs on its investment menu from the beginning of the Class Period through December 29, 2017.¹⁰²
 27 There is no evidence to the contrary. In those instances where a Plan record utilizes both the

28 ¹⁰² See *supra* notes 41 and 42.

1 “Institutional” nomenclature and a ticker symbol to identify the JPMorgan TDF share class on the
 2 Plan’s menu, the ticker symbol is the same as that of the “R5” class. SEC prospectuses confirm that
 3 the “Institutional” and “R5” designations used to identify the JPMorgan TDFs on the Plan’s menu
 4 prior to December 29, 2017, were in fact successive names for the same share class. Plaintiffs’
 5 supposed expert, Mr. Conner, grudgingly conceded the point when confronted with the SEC
 6 prospectuses confirming the name change.¹⁰³ Indeed, the named Plaintiffs themselves admitted that
 7 their own account statements showed they were invested in the R5 class of the JPMorgan TDFs
 8 during periods in which they faulted the Plan for not investing in that same share class.

9 The Plan’s records also establish that the Institutional/R5 class of the JPMorgan TDFs
 10 provided 0.15% (15 basis points) in revenue sharing that could be used to offset the Plan’s
 11 administrative expenses, including Fidelity’s fees for recordkeeping services, whereas the R6 class
 12 provided *no* revenue sharing. SEC prospectuses for the Institutional/R5 and R6 JPMorgan TDF
 13 classes further establish that the revenue sharing provided by the Institutional/R5 class exceeded the
 14 fee differential between the Institutional/R5 class and the R6 class throughout the relevant period.¹⁰⁴
 15 Thus, the Institutional/R5 class was actually cheaper on a “net cost” basis than the R6 class.

16 Further, Bridgebay’s Q3 2017 investment review reflects that the Committee’s decision to
 17 switch to the zero-revenue sharing R6 class was directly related to the \$12 per participant reduction
 18 in Fidelity’s recordkeeping fees. That fee reduction, which became effective as of October 1, 2017,
 19 had the effect of reducing the total revenue sharing needed to offset Fidelity’s recordkeeping fee.
 20 The Plan’s switch to the zero-revenue-share R6 class also corresponded with the Plan’s transition
 21 away from revenue sharing, and toward instead charging participant accounts directly for Plan
 22 administration expenses.

23 Accordingly, the 0.15% (15 basis points) in revenue sharing provided by the R5 class of the
 24 JPMorgan TDFs provides a compelling justification for their inclusion on the Plan’s investment
 25 menu prior to December 29, 2017. Indeed, for this very reason, the Tenth Circuit recently rejected
 26 allegations that the exact funds at issue here—the R5 class of the JPMorgan TDFs—should have

27 ¹⁰³ Ex. 36, Conner Tr. at 170:15-171:14; 171:22-172:9; 173:18-176:14; 179:10-180:15; 182:3-13;
 28 184:9-186:11.

¹⁰⁴ *Id.* at 186:12-189:22.

1 been replaced with the nominally lower-cost R6 class on a retirement plan's investment menu. *See*
 2 *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1150-51 (10th Cir. 2023) (affirming dismissal of
 3 ERISA claims of imprudence because while plaintiffs alleged "the R5 funds offered by the Plan
 4 were more expensive than the R6 funds," "the Plan applied a 15 basis-point revenue credit to the
 5 overall cost of the R5 funds" and therefore "the R5 funds are actually less expensive than the R6
 6 funds"). Moreover, the Ninth Circuit itself recognized that revenue sharing may provide a
 7 "plausible" explanation for Defendants' alleged failure to offer the R6 class of the JPMorgan TDFs.
 8 *Davis v. Salesforce.com, Inc.*, No. 21-15867, 2022 WL 1055557, at *1 (9th Cir. Apr. 8, 2022).
 9 Because the undisputed facts show that the decision to include the Institutional/R5 class on the
 10 Plan's menu was within the "range of reasonable judgments" that a prudent fiduciary could make,
 11 Defendants are entitled to summary judgment on this claim. *See Hughes*, 63 F.4th at 630.

12 **3. Defendants Reasonably Decided Not to Replace the JPMorgan TDFs
 13 With Plaintiffs' Preferred CITs Prior to July 19, 2019**

14 The record shows that Defendants' decision to retain the JPMorgan TDFs on the Plan's
 15 investment menu prior to July 19, 2019 was well within the "range of reasonable judgments" that a
 16 prudent fiduciary could make under the circumstances prevailing at the time. *Hughes*, 63 F.4th at
 17 630. First, there is no dispute that the Committee regularly reevaluated whether to retain JPMorgan
 18 as the Plan's TDF provider and concluded, in conjunction with Bridgebay, that doing so was
 19 warranted by the JPMorgan TDFs' track records. The evidence shows that the JPMorgan TDFs
 20 were sound investments that performed well in comparison to their peer group throughout the Class
 21 Period. Bridgebay's quarterly reviews from Q1 2014 through Q1 2019 reflect that all but one or two
 22 of the JPMorgan TDF vintages had 4-star or 5-star Morningstar ratings at the end of every
 23 quarter.¹⁰⁵ Indeed, at the end of 14 of the 21 quarters during that period, every vintage of the
 24 JPMorgan TDFs had either a 4-star or 5-star rating from Morningstar.¹⁰⁶ As for the remaining 7
 25 quarters, only one vintage of the JPMorgan TDFs had a 3-star rating at the end of 6 of those quarters,

26
 27 ¹⁰⁵ *See* Exs. 17, 24, 27, 28, 31, 47, 49, 60-73 (Bridgebay Quarterly Review of the Salesforce.com
 Inc. 401(k) Savings Plan, Q1 2014-Q1 2019).

28 ¹⁰⁶ *See* Exs. 17, 24, 27, 49, 61, 62-70, (Bridgebay Quarterly Review of the Salesforce.com Inc.
 401(k) Savings Plan, Q3 2014-Q4 2017).

1 and two vintages had a 3-star rating at the end of 1 quarter.¹⁰⁷ Data published in a May 2019
 2 Morningstar Report further shows that the 10-year trailing performance of the JPMorgan TDFs
 3 through the end of 2018 put them in the top 10 percent of their peers; and that the JPMorgan TDFs
 4 were one of only four out of 28 series of TDFs analyzed by Morningstar that earned Morningstar's
 5 highest "Gold" analyst rating as of December 31, 2018.¹⁰⁸

6 Second, the undisputed facts show that Plaintiffs' preferred Passive Blend CITs had only a
 7 three-year track record at the beginning of the Class Period. As explained previously, the Plan's IPS
 8 required that each investment option on the Plan's menu have "a minimum of 5 years of investment
 9 performance, unless specifically exempted by the Committee."¹⁰⁹ The Committee was particularly
 10 concerned with the relatively short track records of CITs and their inability to use the performance
 11 histories of their mutual fund counterparts in disclosures made to investors.¹¹⁰ At the beginning of
 12 the Class Period, the Passive Blend CITs had only a three-year track record, two years less than the
 13 five-year minimum required by the IPS.

14 As the Ninth Circuit recognized, "the different regulatory regimes governing mutual funds
 15 and collective investment trusts" could "justif[y] defendants' delay in making the switch [to CITs]
 16 earlier." *Davis*, 2022 WL 1055557, at *2; *see also Davis v. Salesforce.com, Inc.*, No. 20-cv-01753-
 17 MMC, 2020 WL 5893405, at *6 (N.D. Cal. Oct. 5, 2020) (noting that CITs lack important regulatory
 18 safeguards of mutual funds, including investment diversification requirements, limitations on
 19 leverage, and mandatory oversight by a largely independent board of directors). The factual record
 20 bears this out: the Committee hesitated to switch to CITs given concerns about the investment
 21 vehicles' different regulatory regimes and lack of transparency to participants, among other factors.
 22 As Ms. Ruiz-Zaiko of Bridgebay testified, the Committee was particularly concerned with the lack
 23 of publicly available information about CITs where the CIT had a relatively short track record.¹¹¹

24 ¹⁰⁷ *See* Exs. 28, 31, 47, 60, 71, 72, 73, (Bridgebay Quarterly Review of the Salesforce.com Inc.,
 25 401(k) Savings Plan, Q1 2014, Q2 2014, Q1 2018-Q1 2019).

26 ¹⁰⁸ Ex. 82, Morningstar, "2019 Target-Date Fund Landscape," May 9, 2019, at 32-33, 52; *see also*
 27 Ex. 74, Rebuttal Expert Report of Robert E. Conner, Ex. 4 (showing that the R5 class of the
 28 JPMorgan 2040 TDF had a "Gold" analyst rating from Morningstar as of Mar. 15, 2019).

¹⁰⁹ Ex. 13, 2016 IPS at 999.

¹¹⁰ *See* Ex. 49, "4Q 2015 Review of the Salesforce.com Inc. 401(k) Savings Plan," Dec. 31, 2015,
 SALESFORCE_0004739-839 at 753-754.

¹¹¹ *See* Ex. 50, Ruiz-Zaiko Tr. at 71:24-73:10.

1 According to Ms. Ruiz-Zaiko, the Committee “didn’t want to have the participant look at a fact sheet
 2 with only two-year track record and wonder, wait a minute, was is the CIT? I’ve never heard about
 3 this before. ... I can’t look this up. ... What happened to my Morningstar rating? So they always
 4 wanted to be sure it had at least a five-year track record.”¹¹² Plaintiffs’ supposed expert, Mr.
 5 Conner, admitted that it would be reasonable to consider such concerns in deciding whether to
 6 switch from a mutual fund to a CIT version of the same strategy.¹¹³

7 Furthermore, the Passive Blend CITs pursue an entirely different investment strategy from
 8 the JPMorgan TDFs by investing a significant percentage of their underlying assets in *passively*
 9 managed index funds. *See Davis*, 2021 WL 1428259, at *5; *Meiners v. Wells Fargo & Co.*, 898
 10 F.3d 820, 822 (8th Cir. 2018) (“To show that a prudent fiduciary in like circumstances would have
 11 selected a different fund based on the cost or performance of the selected fund, a plaintiff must
 12 provide a sound basis for comparison—a meaningful benchmark.” (cleaned up)). The record shows
 13 that the JPMorgan TDFs actually outperformed the Passive Blend CITs net of fees in 2014, 2017 and
 14 2019.¹¹⁴ That the JPMorgan TDFs’ annualized net returns exceeded those of the Passive Blend CITs
 15 over multiple periods not only refutes Plaintiffs’ claim that their underlying assets are “substantially
 16 identical,” but also demonstrates the absence of any compelling performance-based reason to replace
 17 them. In fact, Defendants’ expert D. Lee Heavner has found that Plaintiff Miguel would have earned
 18 \$25.20 *less* during the Class Period had his money been invested in the Passive Blend 2055 CF
 19 fund,¹¹⁵ meaning he would have been worse off with Plaintiffs’ preferred Passive Blend CITs.

20 **4. Defendants Reasonably Decided Not to Replace the Fidelity Mutual
 21 Funds with Plaintiffs’ Preferred CITs Prior to July 19, 2019**

22 The record likewise demonstrates that the Defendants reasonably decided not to replace the
 23 mutual fund versions of the Fidelity Contrafund and Diversified International Fund with the
 24 Contrafund CIT and International CIT prior to July 19, 2019. As noted above, the Plan’s IPS
 25 required that “[e]ach investment option chosen should have [...] a minimum of 5 years of verifiable

26
 27 ¹¹² *Id.* at 77:8-78:19.
 28 ¹¹³ Ex. 36, Conner Tr. at 250:21-252:18; *see also* Ex. 10, Case Rep. ¶ 94.
¹¹⁴ *See* Dkt. 82-4 (Declaration of D. Lee Heavner), Ex. 1.
¹¹⁵ *Id.* ¶ 13 & Exs. 2A, 2B.

1 investment performance.”¹¹⁶ The Contrafund CIT and International CIT were both formed less than
 2 three months before the beginning of the Class Period, and thus lacked any meaningful performance
 3 history. The evidence also shows that the lack of any real track record, combined with the lack of a
 4 Morningstar rating, were the main reasons the Committee did not consider including these CITs on
 5 the Plan’s menu at an earlier time. Bridgebay’s Q4 2015 investment review referenced the
 6 “challenge” then presented by the limited performance history of CITs and the impact of that limited
 7 history on the performance data CITs are allowed to publish.¹¹⁷ A slide deck presented by Fidelity at
 8 the Committee’s March 18, 2016 meeting also included a specific comparison of the Fidelity
 9 Contrafund K to the Contrafund CIT, which indicated that the Contrafund CIT’s inception date was
 10 January 17, 2014, that the tracking of its performance began on that date, and that it lacked a
 11 Morningstar rating.¹¹⁸ Bridgebay’s Q3 2016 investment review reiterated those concerns.¹¹⁹

12 Notably, the Contrafund K and Diversified International K mutual funds also provided 0.20%
 13 (20 basis points) in revenue sharing to offset the Plan’s expenses. No revenue sharing was provided
 14 by the Contrafund CIT or the International CIT. In fact, the slide deck that Fidelity presented at the
 15 Committee’s March 18, 2016 meeting shows that the revenue sharing provided by the Contrafund K
 16 exceeded the fee differential between the Contrafund K (0.61% or 61 basis points) and Contrafund
 17 CIT (0.43% or 43 basis points) by 0.02% (2 basis points).¹²⁰ Taking these revenue-sharing offsets
 18 into account, the Contrafund K outperformed the Contrafund CIT by 0.53% (53 basis points) in 2015
 19 and 0.16% (16 basis points) in 2016.¹²¹ Similarly, the International K Fund outperformed the
 20 International CIT by 0.12% (12 basis points) in 2014 and 0.28% (28 basis points) in 2017.¹²²

21 Even without considering revenue sharing, the Contrafund K outperformed the Contrafund
 22 CIT by 0.33% (33 basis points) in 2014, and the International K Fund outperformed the International

24 ¹¹⁶ Ex. 12, 2013 IPS at 750; Ex. 13, 2016 IPS at 999.

25 ¹¹⁷ Ex. 49, “4Q 2015 Review of the Salesforce.com Inc. 401(k) Savings Plan,” Dec. 31, 2015,
 SALESFORCE 0004739-839 at 753-754.

26 ¹¹⁸ Ex. 52, Fidelity Presentation, Mar. 18, 2016, at [22].

27 ¹¹⁹ Ex. 17, “3Q 2016 Review of the Salesforce.com inc. 401(k) Savings Plan,” Sept. 30, 2016,
 SALESFORCE 0004561-658 at 563.

28 ¹²⁰ Ex. 52, Fidelity Presentation, Mar. 18, 2016, at [22].

¹²¹ See Dkt. 82-4 (Declaration of D. Lee Heavner), Ex. 1.

¹²² See *id.*

1 CIT by 0.08% (8 basis points) in 2017.¹²³ The relative outperformance of the Contrafund K and the
 2 International K Fund during those periods once again refutes Plaintiffs' claim that the underlying
 3 assets of these funds are "substantially identical" to Plaintiffs' preferred CIT replacements.

4 Finally, as the Court has recognized, mutual funds offer greater transparency than CITs, as
 5 well as important regulatory safeguards. The record shows that the Committee was well aware of
 6 these differences in transparency and regulatory oversight, and that it took them into account in
 7 making its decisions. *See Hughes*, 142 S. Ct. at 742 ("courts must give due regard to the range of
 8 reasonable judgments a fiduciary may make based on her experience and expertise").

9 **5. Plaintiffs Cannot Demonstrate that the Plan Suffered a "Loss" as a
 10 Result of the Alleged Fiduciary Breaches**

11 Plaintiffs have failed not only to demonstrate any imprudence on the part of the Defendants,
 12 but also to demonstrate any *losses* resulting from the alleged violations. *See Call*, 881 F.2d at 632-
 13 33 ("to recover under [ERISA] § 409(a), appellants must show that appellees' alleged breaches
 14 caused a 'loss' to the plans"). With regard to the prudence claim based on the failure to replace the
 15 JPMorgan TDFs with the Passive Blend CITs at the inception of the Class Period, Plaintiffs have
 16 come forward with *no* evidence of loss whatsoever. Indeed, their purported expert Mr. Connor
 17 offers *no* opinion or calculation regarding any losses resulting from the failure to switch to the
 18 Passive Blend CITs at any time prior to July 19, 2019. Plaintiffs' claims based on the failure to
 19 switch to the R6 class of the JPMorgan TDFs, the Contrafund CIT, and the International CIT fare no
 20 better. Although Mr. Conner purports to calculate "share class" losses allegedly caused by the
 21 failure to make those moves in 2015, 2016 and 2017,¹²⁴ the report submitted by Defendants' expert
 22 D. Lee Heavner shows that, after correcting the multitude of errors made by Mr. Conner, Mr.
 23 Conner's analysis results in total alleged "share class" losses of ***negative*** \$1.1 million—indicating
 24 that the Plan and its participants would have been *worse off* if they had been invested in Plaintiffs'
 25 supposed "lower cost" share classes.¹²⁵ The Court should therefore grant summary judgment on the
 26

27 ¹²³ *See id.*

28 ¹²⁴ *See* Ex. 75, Conner Rep. ¶¶ 35-43.

¹²⁵ Ex. 37, Heavner Rep. ¶¶ 39-40, Ex. 2.A.

1 additional ground that Plaintiffs have failed to sustain their burden of proving that the alleged
 2 breaches caused a “loss” to the Plan.

3 **B. Plaintiffs’ Failure to Monitor Claim is Derivative of Their Fiduciary Breach
 4 Claim**

5 Plaintiffs’ failure to monitor claim is derivative of the underlying breach claim, and fails
 6 along with that claim. *Davis*, 2021 WL 1428259, at **7-8. Because the undisputed facts cannot
 7 support an underlying fiduciary breach, as discussed above, Plaintiffs’ failure to monitor claim also
 8 lacks any merit.

9 **VI. CONCLUSION**

10 For the foregoing reasons, Defendants respectfully request that the Court grant Defendants’
 11 Motion for Summary Judgment.

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13 Respectfully submitted,

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